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Supreme Court, U.S.
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In the
Supreme Court of the United States

LOUIS B. OBERHAUSER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DOES THE MONEY LAUNDERING ELEMENT OF INTENTIONAL PROMOTION, LEFT UNDEFINED IN TITLE 18 U.S.C. §1956, REACH, AS A MATTER OF LAW, MONIES DEPOSITED INTO A LAWYER'S TRUST ACCOUNT AND PAID OUT AS DIRECTED BY THE CLIENT WHERE THE SPECIFIC FUNDS ARE NOT PLOWED BACK INTO THE CLIENT'S UNDERLYING FRAUD?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

PARTIES TO THE PROCEEDING 2

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 9

CONCLUSION 15

APPENDIX 16

TABLE OF AUTHORITIES

CASES

Bailey v. United States, 516 U.S. 137 (1995) 14
Cheek v. United States, 498 U.S. 192 (1991) 14
Hughey v. United States, 495 U.S. 411 (1990) 10
L. and H. Arco, Inc. v. Rapistan Corp.,
446 N.W.2d 372 (Minn. 1989).....9, 10
McBoyle v. United States, 283 U.S. 25 (1931)..... 11
Potter v. United States, 155 U.S. 438 (1894)..... 10
Ratzlaf v. United States, 510 U.S. 135 (1994)..... 10, 14
Spies v. United States, 317 U.S. 492 (1943)..... 10
Swindler and Berlin v. United States, 524 U.S. 399 (1998) 9
United States v. Anderskow, 88 F.3d 245 (3rd Cir. 1996) 10
United States v. Bajakajian, 524 U.S. 321 (1988)..... 9
United States v. Bass, 404 U.S. 336 (1971)..... 11
United States v. Becker, 134 F.3d 714 (5th Cir. 1998) 10
United States v. Brown, 186 F.2d 661 (5th Cir. 1999)..... 13, 14
United States v. Calderon,
169 F.3d 718 (11th Cir. 1999).....11, 12, 13
United States v. Campbell, 977 F.2d 854 (4th Cir. 1992) 12
United States v. Dimick, 24 F.3d 1239 (10th Cir. 1994)..... 13
United States v. Edgmon, 952 F.2d 1206 (10th Cir. 1991) 11
United States v. Gravatt, 280 F. 3rd 1189 (8th Cir. 2002)..... 2
United States v. Heaps, 39 F.3d 479 (4th Cir. 1994)..... 12, 13
United States v. Jackson, 935 F.2d 832 (7th Cir. 1991).... 12, 13
United States v. Jolivet, 224 F.3d 902 (8th Cir. 2000) 7
United States v. King, 280 F.3d 886 (8th Cir. 2002)..... 2
United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991) 11, 12
United States v. Morris, 286 F.3d 1291 (11th Cir. 2002)..... 9-10
United States v. Nattier, 127 F.3d 655 (8th Cir. 1997)..... 6-7
United States v. Oberhauser,
142 F. Supp. 2nd 1118 (Minn. 2001).....2, 4
United States v. Oberhauser, 284 F.3d 827 (8th Cir. 2002)..... 2
United States v. Olaniyi-Oke, 199 F.3d 767 (5th Cir. 1999)... 12
United States v. Paramo, 998 F.2d 1212 (3rd Cir. 1993)... 11, 12

United States v. Sanders, 928 F.2d 940 (10th Cir.), cert. denied, 502 U.S.845(1991).....2, 4

STATUTES

Rule 29(c), Fed.R.Crim.P.....6
Rule 10 (c), Rules of Supreme Court.....14-15
Title 18 U.S.C. §1956(a)(1)(A)(i) 3, 9, 14
Title 18 U.S.C. §1956(a)(2)(B)(i).....11
Title 28 U.S.C. §1254 (1).....2
U.S.S.G. §2S1.1.....11

OTHER

Fenningham, Maura E., Note, "A Full Laundering Cycle is Required; Plowing Back the Proceeds to Carry on Crimes in Crime Under 18 U.S.C. §1956(a)(1)(A)(i)", 70 Notre Dame L.Rev. 891 (1995) 14

No. _____

IN THE

UNITED STATES SUPREME COURT

LOUIS B. OBERHAUSER,

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v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Louis Oberhauser, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

PARTIES TO THE PROCEEDING BELOW

Louis B. Oberhauser United States of America

OPINIONS BELOW

The opinion of the Court of Appeals reversing the District Court's Order, which had granted Mr. Oberhauser a judgement of acquittal or, in the alternative, a new trial, is published at United States v. Oberhauser, 284 F.3d 827 (8th Cir. 2002). The District Court's opinion is also published. United States v. Oberhauser, 142 F. Supp. 2nd 1118 (Minn. 2001).

Opinions concerning two co-defendants can be found at United States v. King, 280 F.3d 886 (8th Cir. 2002) and United States v. Gravatt, 280 F. 3rd 1189 (8th Cir. 2002).

JURISDICTION

The Order of the Court of Appeals denying Mr. Oberhauser's Petition for Rehearing and Rehearing En Banc was filed on June 9, 2002. This Petition is filed within ninety days. Jurisdiction of this Court is invoked under Title 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty or property, without due process of law . . .

STATUTE

Title 18 U.S.C. §1956(a)(1) provides:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity —
>
> (A)(i) with the *intent to promote* the carrying on of the specified unlawful activity . . . shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both (emphasis added).

STATEMENT OF THE CASE

This is about a lawyer duped by his client, the use of a trust account on that client's behalf, the lawyer's acquittal of all sixty-six counts of money laundering and conspiracy to do so, along with the predicate allegations of wire and mail fraud -- sixty-four by the jury and two by the Court. The question presented concerns the split in Circuit authority interpreting the money laundering statute. One theory accepted is that the mere deposit of illicit funds in such a trust account satisfies the statute. The other theory is that the lawyer must actually promote the scheme by plowing the money back into the illegality. In some Circuits, what Mr. Oberhauser did isn't even defined as a crime. He would still be among the innocent.

The case against Mr. Oberhauser began as many cases for

lawyers do: by referral. A long and esteemed client introduced and vouched for Joseph King and his company, G-3, and its successor, K-7 (9.14.2002 T. at p. 154, references by either volume or date of volume). The new client's ostensive business was to sell and market the leasing of Treasury Bills. Investors were promised that their pooled resources would yield high returns. Investors contributed 3,511,000.00 dollars, all of them hoping for an acute enrichment. The initial goal had been to raise $2,000,000 more. Mr. Oberhauser had not met any of the investors, save an attorney for one, until after these funds were deposited and released; none relied upon him in making a single decision. (9.28.2000 T. 68-78); see also United States v. Oberhauser, 142 F. Supp. 1118, 1122 (Minn. 2001) for an abbreviated summary of this three-month trial.

Mr. Oberhauser, now 69, was asked by his new client to establish a trust account via his law firm. The retainer agreement was executed in February, 1996, and read, in part, that the Oberhauser & Neveaux firm would "accept wire transfers of funds into a designated depository account on G-3, Inc.'s behalf, and I will disburse these funds by check or wire transfer per written direction of Joe W. King." Oberhauser, 142 F. Supp. 1118, 1123 (Minn. 2001). Thus the account was opened, Mr. Oberhauser describing his role as that of a "disbursement agent" for his clients, (9.28.2002 T. at 65, 77-96), the same role required by the Minnesota Rules of Professional Conduct. (10.5.2000 T. at 58-62).

Six months later, on August 28th, 1996, at the behest of his client, the Oberhauser & Neveaux trust account received a $160,000 wire transfer from Sun Trust Bank Account in Cleveland, Tennessee, from the Group Resources, Inc. account there. Id. at 1121-24. Group Resources was the umbrella organization for K-7; that is, the funds and profits from K-7

were sent to Group Resources. Id. at 1122. A second payment to ChildHelp, of $80,327.91, was wired by Group Resources directly to California on the 29th of August, without utilizing the Oberhauser and Neveaux trust account. (Gov't Exh. 365).

On November 25, 1996, the Oberhauser & Neveaux trust account transferred $160,000 to ChildHelp, a nationally recognized charity located in Encino, California, on instructions from Joseph King. Id. at 1125; Count 59. A defense expert testified that the transfer was indeed "for charity." The government's position, of less persuasive vigor, was that the purpose of this transfer was not entirely clear. Id. at 1124.

The Honorable Donovan Frank, who presided, observed that "neither ChildHelp nor K-7's involvement in charities played a significant role in either the prosecution or the defense of the case." Id. at 1126.

> [T]here (was) no evidence that either the $160,000 deposit into or the transfer out of Defendant Oberhauser's trust account promoted the underlying criminal activity in any way. *There is no evidence to suggest that either transfer was to be reinvested back into the underlying fraud scheme or that the transaction in any way actually promoted the underlying fraud scheme.* No evidence was presented that any investor knew about the wire transfer in November 1996, that K-7 touted the transfer in any way to influence investors, or that it was otherwise manipulated or referred to, whether directly or indirectly, in an attempt *to promote* the underlying scheme or to solicit prospective investors.

Id. at 1127-1128 (emphasis added).

So remote was ChildHelp that the government did not even mention the charity in opening statement (Opening Statements

T. at p. 4), nor in closing (XXII T. at 22-31). Not a single investor indicated that their motivation was a charity contribution with the profits.

Without a rebuttal, the Court came to agree with Mr. Oberhauser's view that the $160,000 transfers were specific, compared to fungible. Id. at 1125. The government's own expert indicated that the $160,000 in and later out of the trust account of course matched dollar for dollar. (T. XII at pp. 105-106). Cross-examination of Mr. Oberhauser only served to reaffirm his belief that $160,000.00 was not commingled with other funds, but rather was specifically designated; the wire transfer, as noted, came from a specific account, and the balance of his trust account never dipped below 160,000. (T. XVII at p. 187).

Jury deliberations began October 11, 2000. The following day a note was sent to the Court stating: "We would like expansion of the term intentionally please," which was answered with a referral back to the patterned instruction. Docket Entry 313. By the 17th, the jury had exonerated Mr. Oberhauser of all counts, but then sent this message: "A question has come up that would require us to revisit the Oberhauser charges and possibly change our verdict on two counts. Is this within our rights?" Yes. Docket Entry 319. The following day, Mr. Oberhauser was acquitted of 64 counts, but convicted of the remaining two (Counts 53 and 59), involving $160,000 transfers.

Granting Mr. Oberhauser's renewed Motion for Judgement of Acquittal, See Rule 29(c), Fed.R.Crim.P., the District Court began with the statute in play, 18 U.S.C. §1956, noting that the requisite proof had to show that he "intended to promote the underlying criminal activity to sustain a conviction under the promotional prong of the law." Id. at 1128 (citing United States v. Nattier, 127 F.3d 655 (8th Cir. 1997)). Mr. Oberhauser's

status as a lawyer clouded the issue, for there was no requirement that he know all about his client, or that he assume the status of a cynic, a doubter. His "responsibility was not to evaluate and determine the source of deposits into the account. Defendant Oberhauser received the transfers into the IOLTA trust account and disbursed them to third parties consistent with instructions from his client," the recipient being ChildHelp. Id. at 1129.

The Court also found the government's view of "to promote" to be flawed. "That provision has an intent element that must be satisfied so that evidence of intentional promotion must be present. Otherwise, the money laundering statute for the Court could be transformed into a 'money spending' statute any time money was expended or deposited." Id. at 1128 (citing United States v. Jolivet, 224 F.3d 902 (8th Cir. 2000); Nattier, supra). The evidence was insufficient to conclude that Mr. Oberhauser "knew the money represented the proceeds of some form of unlawful activity." Id. at 1125. Again, there was "no evidence to suggest that *either transfer was to be reinvested back into the underlying fraud scheme* or that the transaction in any way actually *promoted* the underlying fraud scheme." Id. at 1128 (emphasis added).

The Court noted as well that the government's lead witness, Scott Wallis, told the jury that as late as 1998, over a year after the transfers at issue, he still "did not believe that he was involved in a scam or fraudulent scheme." Id. at 1130. This mirrored Mr. Oberhauser's testimony. (XIV T. at 50). The Court reasoned that "regardless of the source of the funds with respect to Counts 53 and 59, and regardless of whether the $160,000 that was deposited in August is the same $160,000 that went out in November for ChildHelp, there is insufficient evidence for this Court to conclude and for a reasonable jury to

have concluded, that when the transfers were made on August 28, 1996, and November 25, 1996, the defendant knew that the money represented the proceeds of some form of unlawful activity -- that is, wire fraud and mail fraud. Id. at 1125.

The Eighth Circuit reversed, noting that "from the beginning, K-7's investment program promised highly improbable returns." 284 F.3d at 830. The Circuit honed in on the fact that "Oberhauser himself did not invest in the program," and, later, "he contracted directly with investors, and violated his contractual duty to them by transferring funds out of the trust account before the full 5.5 million was reached . . ." Moreover, "Oberhauser was financially motivated to earn attorney's fees from K-7 and to receive a percentage of any successful deals." Id. at 832.

The Circuit disagreed with Judge Frank, who had the better feel of the case, and concluded instead that "a reasonable jury could infer that when Oberhauser engaged in the financial transactions for which he was convicted, he knew the transferred funds were the proceeds of unlawful activity and he intended to promote the carrying on of the unlawful activity." Id. at 273. The contribution to ChildHelp may have had the effect of making investors feel as if their investments were legitimate when they were not. Id. at 833.

The Circuit's rationale that there was comfort in the fact that the investors invested because a portion of the profits was charity bound is theoretical, however. None of the investors testified that they were swayed by a contribution to charity; none knew of the wire transfers. That an additional $80,000 was transferred by Group Resources directly to ChildHelp at about the same time, lends the inference that the $160,000 transfer could have been likewise accomplished without Oberhauser's trust fund. (Govt. Exh. 365 at p. 18).

Mr. Oberhauser's Petition for Rehearing and Suggested Rehearing En Banc was denied, on June 9th, 2002. This Petition follows.

THE REASONS WHY CERTIORARI SHOULD BE GRANTED

Title 18 U.S.C. §1956(a)(i)(A)(i) prohibits financial transactions accomplished "with the knowing use of the proceeds of illegal activities," done with the "intent to promote the carrying on" of unlawful activity. "By its nature, money laundering is difficult to prove," United States v. Bajakajian, 524 U.S. 321, 351 (1988) (J. Kennedy, dissenting), which begs the historic question of why the crime has been so difficult to define.

This case enters into what has become a murky intersection of the lawyer's duties and obligation to funds he holds in trust-where he does what the client instructs-with the promotional element of the money laundering statute. If Mr. Oberhauser were not a lawyer, a bank say, or an escrow agent, this would be a little easier. But the attorney/client relationship is one of a certain trust-based largess; it would be wrong to assume that relationship with the client is narrow or cheap, that it does not serve "broader purposes." Swindler and Berlin v. United States, 524 U.S. 399, 407 (1998). If there is a myopia in the law, it is in a select vision, the lawyer's focused "duty to zealously represent the client and resolve all doubts in favor of the client." L. and H. Arco, Inc. v. Rapistan Corp., 446 N.W.2d 372, 379 (Minn. 1989). Mr. Oberhauser had no duty to disclose anything about his client, its past, its promises; his loyalty was to no one else. E.g. United States v. Morris, 286 F.3d 1291 (11th Cir. 2002) (holding at the defendant/attorney, as a matter of law,

"did not have an attorney client relationship with any of the victims" of the alleged scam).

The lawyer's silence in the face of skepticism or inquiry is also recognized. "[N]on-disclosure does not constitute fraud absent a legal or equitable obligation." Rapistan Corp., 446 N.W.2d at 380. The Fifth Circuit has observed that the money laundering statute ought not reach the defendant who does no more than discharge "properly his duties as an attorney . . ." United States v. Becker, 134 F.3d 714, 719 and 721 (5th Cir. 1998). Put another way, Mr. Oberhauser is not to be made "a criminal for being a lawyer." Id. at 720.

The most significant fact here is not that investors eager for high returns took even higher risks and lost, 284 F.3rd at 830, but that Mr. Oberhauser received and disbursed the funds in accordance to his client's wishes, not to mention the Minnesota Rules of Professional Conduct. Compare United States v. Anderskow, 88 F.3d 245, 253 (3rd Cir. 1996) (attorney/ defendant divided up funds "among his coconspirators instead of retaining them in his escrow account," hence money laundering conviction affirmed).

A lawyer may counsel or advise the client, but that does not mean that he promotes what the client eventually does unkown to him. It is in this context that we reach the money laundering statute. Since the word "promote" is part and parcel of the intent required, it cannot be considered surplusage. Ratzlaf v. United States, 510 U.S. 135, 140-141 (1994); Potter v. United States, 155 U.S. 438, 446 (1894). Indeed "to promote" must be interpreted in its context, Ratzlaf, 510 U.S. at 141; Spies v. United States, 317 U.S. 492, 497 (1943); any doubt as to its meaning must be construed in favor of lenity. Hughey v. United States, 495 U.S. 411, 422 (1990). As this Court has said over and over again, "[f]air warning should be given to the world in

language that the common world will understand," United States v. Bass, 404 U.S. 336, 347-50 (1971) (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931) (Homes, J.)).

The trial court left the phrase "to promote" undefined in its jury instructions. (Oct. 11, 2000 transcript at p. 174). The jury was confused as to what intentionally meant. Docket Entry 313. There isn't a definitive explanation anywhere.

What we do know, though, is that the promotional prong is different from other aspects of the money laundering if for no other reason that the United States Sentencing Guidelines call for a higher severity level (26), when compared to the concealment prong, see §1956(a)(1)(B)(i), which starts at level 20. U.S.S.G. §2S1.1. The penalty is higher because promotion infers encouragement and facilitation of further crimes. Concealment, by contrast, is the hiding of what has already occurred. See United States v. Calderon, 169 F.3d 718, 722, n. 5 (11th Cir. 1999); United States v. Edgmon, 952 F.2d 1206, 1214 (10th Cir. 1991).

Unanimously noting the penalty difference, the Circuits are nonetheless in conflict as to the scope and meaning of the word promote. Some have held that a mere deposit into an account, no matter the holder or title, is enough. United States v. Paramo, 998 F.2d 1212, 1217-18 (3rd Cir. 1993) (upholding promotion conviction where defendant cashed embezzled checks and he knew the checks would be worthless unless exchanged for negotiable currency), cert. denied, 510 U.S. 1121 (1994); United States v. Montoya, 945 F.2d 1068, 1076 (9th Cir. 1991) (upholding promotion conviction where defendant deposited a check representing the proceeds of the unlawful activity because the defendant "could not have made use of the funds without depositing the check").

Other Circuits require that the proceeds be spent in

furtherance of an illegal scheme, be plowed back. E.g. Calderon, 169 F.3d at 722 (no indication that the money, once deposited, was spent; nor did the defendant personally profit from the specific transaction); United States v. Olaniyi-Oke, 199 F.3d 767, 770 (5th Cir. 1999) ("absent a showing of specific intent, the promotional prong is not satisfied even by a showing that the financial transaction did promote the carrying on of unlawful activity").

Still other Circuits require an additional layer of intent be proven. For example, in United States v. Heaps, 39 F.3d 479, 486 (4th Cir. 1994), the defendant, an ecstacy dealer, received money orders derived from illicit sales. Id. at 482. The money orders were cashed by a third party, the cash given to the defendant. Ibid. The government charged promotional money laundering. The Fourth Circuit reversed, holding that promotional intent required *"actual subjective knowledge"* the money in question was not only tainted, but that the same money was to be used to further the drug business. Id. at 484 (quoting United States v. Campbell, 977 F.2d 854, 857 (4th Cir. 1992) (emphasis added), cert. denied, 507 U.S. 938 (1993)).

The Fourth Circuit in Heaps rejected the government's theory, embraced in Montoya and Paramo, a theory in effect accepted here against Mr. Oberhauser, that once received, the jury was entitled to infer if not presume the money would "be plowed back" to promote the drug business. Id. at 485. Heaps sided instead with the Seventh Circuit, which requires actual proof of a "plowing back" in order to sustain a §1956 conviction. Id. at 481 (citing United States v. Jackson, 935 F.2d 832, 841 (7th Cir. 1991)). Moreover, the Heaps Court refused to hold, as the government had suggested, that any transaction of money for drugs would be money laundering, finding the reach of Title 18 U.S.C. §1956 was limited. Id. at 486.

The Tenth and Fifth Circuits have agreed with Heaps. See United States v. Sanders, 928 F.2d 940, 944 (10th Cir.) (distinguishing a transaction that does not promote the underlying crime with ones that do), cert. denied, 502 U.S. 845 (1991); United States v. Brown, 186 F.2d 661, 670 (5th Cir. 1999) (Section 1956 does not "simply provide overzealous prosecutors with a means of imposing additional criminal liability any time a defendant makes benign expenditures with funds derived from unlawful acts"); Cf. United States v. Dimick, 24 F.3d 1239, 1246 (10th Cir. 1994) (declining an interpretation of §1956 that would cover all transactions involving tainted funds).

In this mixture of higher and lower intent requirements, and in the recognition "to promote" must matter but that it might not if a mere deposit is made, the cases have become sui generis. But the law ought not be situationally applied, especially where what happened here happens in almost every lawyer trust: the client deposits funds to be held, the client directs funds be released and they are. The client may be rotten, may be a Nobel Prize winner, may have gained an award from a personal injury, and the process is all the same.

That the $160,000 was electronically wired is a distinction without a difference. That it was transferred at the client's direction, was not commingled, ChildHelp was an established charity that did not, and could not plow back funds, and Mr. Oberhauser did not profit directly from this transaction should have ended the matter. To say this much is money laundering runs afoul of the definitional rulings in Heaps, Dimick, Brown, Jackson, Sanders, and Calderon. It's a matter of fate that Mr. Oberhauser was convicted at all. Had he resided in the Fourth, Fifth, Seventh or Tenth Circuits, his conduct would not have been considered a crime.

The Eighth Circuit's ruling that this is the stuff of money laundering has been similarly criticized in academic circles as applying a broader prescription of "promotion" than Congress had intended. Maura E. Fenningham, Note, A Full Laundering Cycle is Required; Plowing Back the Proceeds to Carry on Crimes is the Crime Under 18 U.S.C. §1956(a)(1)(A)(i), 70 Notre Dame L.Rev. 891, 938 (1995). The idea of promotion infers Mr. Oberhauser intended, through these transactions, to contribute "to the growth or prosperity" of the illegality, not to exchange funds. Fenningham, at 915. A disbursing agent, as was Mr. Oberhauser's perception of himself for the transaction, is not a promoter even in the vague definition of that term.

Almost all the cases have observed, e.g., that "Congress intended a stringent mens rea requirement for promotion of money laundering." Brown, 186 F.3d at 665. That sentence is well and good, but what level of intent is required for this complex statute, at present state of the law, remains uncertain. In like settings, this Court has provided clarification. See e.g. Cheek v. United States, 498 U.S. 192, 202-204 (1991) (subjective misunderstanding that defendant has violated the tax law negates required element of wilfulness, even if not written into the statute); Ratzlaf, 510 U.S. at 144 (defendant accused of structuring transactions must act with actual knowledge that the structuring is illegal even though statute doesn't say so, because "currency structuring is not inevitably nefarious"); Bailey v. United States, 516 U.S. 137, 150 (1995) (interpreting the verb "use" to mean the defendant "actively employed" a firearm in relation to the predicate crime; government's argument that "use" meant passive possession rejected).

Certiorari is to be granted where there is circuit confusion "in both the standards they have articulated" and "the results reached." Bailey, 516 U.S. at 142. See Rule 10 (c), Rules of

Supreme Court. What "to promote" means is ultimately for this Court to say.

CONCLUSION

Based upon the foregoing, Mr. Oberhauser requests that his petition for writ of certiorari to the Eighth Circuit be granted.

Respectfully submitted,

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APPENDIX

1. Order of the Eighth Circuit Court of Appeals denying Mr. Oberhauser's Petition for Rehearing and Rehearing En Banc, filed June 10, 2002.

2. Opinion of the Eighth Circuit Court of Appeals, United States v. Oberhauser, 284 F.3d 827 (8th Cir. 2002).

3. Order of the District Court granting Mr. Oberhauser's Motion for Judgement of Acquittal or in the Alternative, a New Trial.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 01-1812

United States of America,	x	
	x	
Appellant,	x	
	x	Order Denying Petition for
v.	x	Rehearing and for Rehearing
	x	En Banc
Louis B. Oberhauser,	x	
	x	
Appellee.	x	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

June 10, 2002

Order Entered at the Direction of the Court:

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-1812

United States of America,

Appellant, *
* Appeal from the United
* States District Court for
* the District of Minnesota.
Louis B. Oberhauser, *
*
Appellee. *

Submitted: February 12, 2002

Filed: April 4, 2002

Before McMILLIAN, FAGG, and RILEY, Circuit Judges.

FAGG, Circuit Judge.

Richard Gravatt, Joe King, Richard King, Murray Evans, Frank Taylor, and Scott Wallis were charged in an eighty-nine count indictment with conspiracy, wire fraud, mail fraud, money laundering, and conducting a continuing financial crime enterprise. The charges arose from their operation of a Treasury bill-leasing "ponzi" scheme through a corporation called K-7. Investors in the scheme lost over $11 million. Louis B. Oberhauser, the group's lawyer, held some of the invested funds in an attorney trust account designated for K-7 investment money, and a superseding Indictment added him as a defendant. All the defendants except for Gravatt and Oberhauser pleaded guilty. At a joint

trial, Gravatt was convicted on 68 counts and sentenced to 262 months in prison. The jury acquitted Oberhauser of 64 of b6 counts, but convicted him on two counts of money laundering under 18 U.S.C § 1956(a)(1)(A)(i). The district court granted Oberhauser's motion for acquittal, and conditionally granted his alternative motion for a new trial. The Government appeals.

We must reinstate the jury's verdict if, drawing all reasonable inferences in favor of the verdict, `there is an iratepretation of the evidence that would allow a reasonable minded jury to find the defendant[] guilty beyond a reasonable doubt.'" United States v. Ervasti, 201 F.3d 1029 1036 (8th Cir. 2000). The criminalized act under § 1956(a)(1)(A)(i) is the reinvestment of illegal proceeds rather that the concealment of those proceeds. Id.

The Government relies on the following trial evidence as proof of Oberhauser's guilt. Oberhauser's first contact with anyone involved in K-7 was in the spring of 1995 when Gravatt and Steven Cudlipp hired Oberhauser, a real estate and corporate attorney, to facilitate the purchase of a $2.8 million property: The realtor, who worked in the same building as Oberhauser, introduced Gravatt to Oberhauser. Unbeknownst to the realtor and Oberhauser, Gravatt had served time in prison for fraud: On behalf of his clients, Oberhauser incorporated Carlingford Management Services, which was to own the property. The Carlingford Foundation deposited $250,000 in earnest money, but after numerous delays, the earnest money was forfeited when Gravatt and Cudlipp did not pay the balance due. Gravatt explained to Oberhauser that he had a falling out with Cudlipp. In January 1996, Gravatt established a high finance company {the predecessor to K-7) for the purpose of performing trading programs organized by Gravatt. Oberhauser was retained on the company's behalf. Gravatt's trading program was a "roll

program" in which the company would supposedly trade $100 million in treasuries making a small percentage on every trade, which through a multiplication factor would yield a large income. Gravatt said the Treasury bills could not be leased until the company had $5.5 million in investment money . According to cash investment sheets provided to investors, the $5.5 million total investment would be used to lease $100,000,000 in Treasury bills, and trades on those bills would field $2,000,000 per trade and $900,000 per trade to investors, with a weekly amount to investors of $3,600,000. Rental fees of $13,750,000 and a set up fee of $3,000,000 would be paid. For a participant investing $50,000 towards the $5.5 million, the total treasury amount would be $909,091, the yield per trade would be $18,182, the yield per trade to investor would be $8,182, the weekly amount to investor would be $28, 459, and the net amount to the investor would be $1,166, 8 1 8. At trial, the Government's expert witness testified the program's claims amounted to preposterous 2000% return. To make the program attractive to employees and investors, profits from the trading program were to go to the charity Child Help.

On February 8,1996 Oberhauser sent Joe King a retainer letter acknowledging Oberhauser's firm had been retained to consult with King about matters relating to the company and the distribution of funds. Oberhauser stated he would "accept wire transfers of funds into a designated depository account on [the company's] behalf, and [would] disburse the[] funds... per written direction of Joe W. King or other parties properly authorized." Gravatt introduced Oberhauser to Taylor as the escrow attorney who was to receive the funds from the investors and hold them until he could "authenticate, verify and validate the treasuries," then release them for trading. Oberhauser drafted an escrow agreement, letter of authorization to act on the investor's behalf, and agreement of procedures. In April 1996, after

Oberhauser helped incorporate K-7, Gravatt promised Oberhauser 1 % of any deal if he helped arrange a standby letter of credit in the amounts of $9,18, or 27 million. Oberhauser introduced K-7 to 'a bank in an effort to secure financing for them. In the spring of 1996, Scott Wallis joined K-7 as a consultant and was paid a weekly salary to bring investors to K-7. Wallis was introduced to Oberhauser at K-7's offices, 12 rented apartments in an upscale Minneapolis suburb, as K-7's attorney. K-7 raised money in two ways. First, K-7 and certain investors entered into a contract that represented K-7 had "knowledge, experience and contacts in the marketplace for bank instruments necessary to make prudent decisions in the contracting for leasing of United States Treasury. `T' Bills," with the funds being deposited in the Group Resources, Inc. bank account. Between May and December 1996, $1.43 million in investment money was deposited in the Group Resources account. Second, investors and Oberhauser's law firm entered into contracts giving Oberhauser "authorization to act upon [the investor's] behalf for the purpose of entering into a trading program with International Capital Services, Inca," after receiving $5.5 million. The funds were deposited in an Oberhauser firm trust account set up for the exclusive purpose of holding investors' money. Oberhauser did not solicit the investors or advise the investors himself.

In August 1996, Gravatt and King discussed with Oberhauser the preparation of a termination contract for Lin Fox, a woman hired by K-7 to be Gravatt's girlfriend. For this legal work, he billed K-7 for a "general corporate matter." In the fall of 1996, Wallis overheard Gravatt and King discussing that Oberhauser was going to "make $20 million on this deal," and later asking Oberhauser what he was going to do with all those millions.

On August 28, 1996 King transferred $160,000 of investors',

funds from the Group Resources account to the Oberhauser trust account. Oberhauser was familiar with Group Resources because his firm had been paid $5000 on April 17, 1996, for legal services on behalf of K-7 from an account in the name of Group Resources.

Further, Oberhauser identified the $160,000 as investors' funds on his trust account bank statement. Oberhauser was convicted of money laundering for this transaction. Meanwhile, the K-7 principals attempted to buy a $10 million office building with Oberhauser acting as their attorney. On August 30, 1996, Oberhauser prepared a letter to the real estate company submitting. K-7's bid on the building but refusing to provide K-7's financial information and references unless K-7 was the successful bidder. Eventually, K-7 forfeited $350,000 in earnest money. Beginning in August 1996, Sandro Sordi, Esq., on behalf of Gordon Groves, began negotiating with K-7 for Groves' $2.5 million investment as purportedly the last part of the $5.5 million. Knowing he was holding only $1.3 million, Oberhauser redrafted the contracts for Sordi and removed the language requiring a total of $5.$ million. In October 1996, before, Groves' $2.5 million was commingled with the $1.3 million, Oberhauser started transferring funds from the trust account: $600,000 for leasing the Treasury bills, and $411,000 to K-7. Oberhauser later traveled with Gravatt and King to Atlanta for settlement on the Treasury bill lease, and faxed copies of the documents to Sordi, who then released Groves' $2.5 million to Oberhauser's trust account. From those funds, Oberhauser transferred $2.4 million as a further broker's commission and another $100,000 to K-7:

On November 18, 1996, Oberhauser visited Wallis at the K-7 offices and obtained a worthless $1.9 million note payable to the Oberhauser trust account on behalf of Monarch Consulting, a corporation of Joe King's, and then sent Sordi

a letter describing that he had obtained the full $5.5 million through $3.511 million in escrowed investor deposits and "a direct payment [by Monarch Consulting] of $1,989,000." On November 25, 1996, Oberhauser transferred $160,000 to ChildHelp. At trial, an Internal Revenue Service agent testified the transfer to ChildHelp was money laundering because it made the money appear to be proceeds of a successful deal. The jury agreed and convicted Oberhauser of money laundering for the transfer.

In overturning the jury's verdict, the district court recognized "there [was] no credible evidence to suggest that there was ever a legitimate [Treasury-bill] leasing program or that any of the so-called documents supposedly verifying the program were authentic." Nevertheless, the court stated that regardless of the source of the funds and regardless of whether the $160,000 that was deposited in August was the same $160,000 that was paid out in November, there was insufficient evidence for a reasonable jury to conclude that when the transfers were made, Oberhauser knew the money represented the proceeds of some form of unlawful activity. Although there was circumstantial evidence in the case suggesting Oberhauser knew in April 1997 that the money represented the proceeds of unlawful activity, there was no evidence he had such knowledge in the fall of 1996. The court noted that both transfers occurred so early in the fraudulent scheme that there was no basis by which the Government could argue Oberhauser turned a blind eye or otherwise deliberately avoided criminal knowledge, even though the court had given the jury our model willful blindness instruction. The court did not doubt that Oberhauser's role changed and his level of knowledge was quite different after all funds were disbursed and various problems were encountered with the program beginning in the early part of 1997. The court also stated there was insufficient evidence for a reasonable jury to conclude

Oberhauser intended to promote the carrying on of wire fraud and mail fraud. Following our decision in Jolivet, 224 F.3d at 909, the district court rejected the Government's argument that mere acceptance of funds into the trust account was sufficient to convict of Oberhauser of promotional money laundering, and stated acceptance of a wire transfer does not show criminal intent and criminal knowledge when Oberhauser did not control the deposits going into the account.

The Government contends the knowledge element in both counts is proved by direct proof of Oberhauser's understanding of the fraudulent nature of K-7's Treasury bill leasing program or his willful blindness to such facts. Viewing the evidence in the light most favorable to the Government, we conclude a reasonable jury could infer that when Oberhauser engaged in the financial transactions for which he was convicted, he knew the transferred funds were the proceeds of unlawful activity and he intended to promote the carrying on of the unlawful activity.

Even if Oberhauser did not know about K-7's fraudulent nature when he was first retained, a reasonable jury could find he knew K-7's program was not legitimate six months later, by August 28, 1996, and instead of withdrawing, continued as a willing participant in the scheme in return for substantial compensation. See United States v. Anderskow, 88 F.3d 245, 252-53 (3d Cir.1996) (holding evidence sufficient to support money laundering conviction of attorney who held and disbursed funds from his escrow account for a crooked financier client). From the beginning, K-7's investment program promised highly improbable returns. Oberhauser himself did not invest in the program. Oberhauser drafted the Treasury-bill leasing program documents. Oberhauser contracted directly with investors, and violated his contractual duty to them by transferring

funds out the trust account before the full $5.5 million was reached and by holding their money in excess of the contractual grace period of sixty days. Further, Oberhauser was financially motivated to earn attorney's fees from K-7 and to receive a percentage of any successful deals. The jury could reasonably find that Oberhauser was willfully blind because he knew of a high probability that the K-7 program was fraudulent and deliberately avoided learning the truth. See Unite States v. Lalle 257 F.3d 751, 755 (8th Cir. 2001. As for the November 1996 transaction, Oberhauser argues the transfer to charity was a "benign expenditure" even if the funds were from an unlawful activity, United States v. Brown186 F.2d 661, 666 (5 th Cir. 1999), but the jury could reasonably find otherwise. Because K-7 induced investors to give them money by stating their profits went to charity and by prominently displaying plaques commemorating their contributions, the transfer to the charity promoted continuation of the fraud scheme. We thus conclude sufficient evidence supports Oberhauser's convictions.

The Government also argues the district court abused its discretion in conditionally granting a new trial. Oberhauser has moved to strike this argument asserting we lack jurisdiction to consider it because the Government's notice of appeal references only the district court's motion for judgment of acquittal. We construe notices of appeal liberally in favor of jurisdiction, particularly when there is no prejudice to the adverse party and the parties have briefed the issue. Greer v. St. Louis Regional Med. Ctr., 258 F.3d 843, 846 8" Cir. 2001); Sather v. IRS 251 F.3d 1168, 1172 (8th Cir.1997). Here, Oberhauser does not assert any prejudice and has briefed the issue's merits. We thus deem the notice of appeal sufficient, and deny Oberhauser's motion to strike the Government's argument. The district court granted the new trial because the "verdicts [were] contrary to the weight of the evidence ... particularly when

the newly discovered evidence . . : is considered." The newly discovered evidence consisted of nine documents that were contained in the government's discovery and accessible to defense counsel before and during trial, contained in about 400,000 pages of seized or subpoenaed documents. A motion for a new trial based on newly discovered evidence cannot be granted unless, among other things, the evidence is discovered after the trial. United States v. Liebo, 923 F.2d 1308, 1313 (8t" Cir. 1991). We have refused to excuse a defendant's failure to discover available records despite his claim that "the documents were part of a 400,000-page document repository which he did not have time to examine document by document." United States v. Tierne 947 F.2d 854, 863 8t" Cir. 1991). Given this controlling authority, we conclude the district court abused its discretion in granting a new trial based on newly discovered evidence. In sum, we reverse the district court's grant of judgment of acquittal to Oberhauser and reinstate the jury's verdict convicting him. We also reverse the district court's grant of a new trial. We remand for further proceedings consistent with this opinion.

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Criminal No. 99-20(7)(DWF/A-T.B)

United States of America,

Plaintiff,

ORDER AND MEMORANDUM

Louis B. Oberhauser,

Defendant.

Lizabeth A. McKibben, Assistant United States Attorney, 600 United States Courthouse, 300 Fourth Street South, Minneapolis, MN 55415, counsel for Plaintiff.
William 3. Mauzy, Esq., Mauzy Law Office, 510 First Avenue North, Suite 610, Minneapolis, MN 55403-1610, counsel for Defendant.

The above-entitled matter is before the Court on Defendant Louis B. Cberhauser's motion for judgement of acquittal, pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure, or, alternatively, for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The motions are opposed in all respects by the United States. Based upon the extensive written submissions and presentations of counsel, and the Court having reviewed the file in this matter and being otherwise duly advised in the premises, the Court hereby enters the following:

ORDER

l. Defendant Louis B. Oberhauser's motion for judgment of acquittal on Count 53 (money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i)) (Doc. No. 333) is hereby GRANTED for the reasons set forth in the attached

memorandum. The Court respectfully directs that judgment of acquittal-with respect to Count 53 be entered consistent with the Court's ruling.

2. Defendant Louis B. Oberhauser's motion for judgment of acquittal on Count 59 (money laundering in violation of 1956(a)(1)(A)(i)) (Doc. No. 333) is hereby GRANTED for the reasons set forth in the attached memorandum. The court respectfully directs the judgment of acquittal with respect to Count 59 be entered consistent with the Court's ruling.

3. Pursuant to Rule 29(d) of the Federal Rules of Criminal Procedure, Defendant Louis B. Oberhauser's motion for a new trial (Doc. No. 334) is CONDITIONALLY GRANTED in the event that the judgment of acquittal is vacated or otherwise reversed on appeal.

LET THE JUDGMENT BE ENTERED ACCORDINGLY.

Judge of United States District Court

MEMORANDUM

I. Introduction

The Defendant, Louis B. Oberhauser, was indicted for 66 federal crimes in a second superseding indictment by a United States Grand Jury. Defendant Oberhauser was tried with Co-Defendant Richard C. Gravatt in a trial lasting from September 8 to October 11, 2000. Pursuant to a jury verdict issued on October 18, 2000, Defendant Oberhauser was found guilty of two of the sixty-six charges, Counts 53 and 59.

Count 53 charged money laundering in violation of Title 18 U.S.C. § 1956(a)(1)(A)(i) involving a S1b0,40d wire transfer from the Group Resources, Inc. account at Sun Trust Bank into the Oberhauser & Neveaux Norwest Bank IOLTA trust account on August 28,1996. Count 59 charged money

laundering in violation of Title 18 U.S.C. § 195b(a)(I)(A)(i) involving $160,000 wire transfer from the Oberhauser & Nevcaux IOLTA trust account to ChildHelp on November 25, 1996. The Defendant was acquitted of all other counts in the indictment, including Count I (conspiracy to commit money laundering); Counts 2-15 (wire fraud); Counts 16-23 (mail fraud); Counts 24-29 (money laundering relating to the purchase of the Firststar Building); Counts 50-52, 54-58, 60-61 (money laundering); Count 62 (conspiracy to commit money laundering); Counts 63-69 (wire fraud relating to investor Achilles Buser); Counts 74-81 (money laundering); and Counts 82-86 (money laundering).

Being mindful of the dedicated Jury that sat through six weeks of testimony and argument, and then deliberated for four days on a total of eighty-nine counts between two defendants, it is thus Court's considered view that there is insufficient evidence to support the guilty verdict with respect to Counts 53 and 59 against Defendant Oberhauser.

II. Factual Background

Eight individuals were indicted in relation to the underlying circumstances of the above entitled matter. Originally, the indictment charged Defendants Murray Evans, Richard Gravatt, Joe King, Richard King, Frank Taylor, and Scott Wallis. All parties were arrested except Richard Gravatt, who fled. A separate indictment also charged Defendants Joe King and Richard King in a related cash rental scheme. That case was tried before a jury and the undersigned in September 1999, resulting in convictions against both Defendants. Defendants Murray Evans and Scott Wallis pled guilty in the instant case, and Defendants John Dow and Frank Taylor pled guilty to related informations charging tax evasion.

The indictment in the above-entitled matter was then superseded, adding Defendant Louis B.

Oberhauser and additional charges concerning a subsequent conspiracy. Joe King and Richard King, subsequent to their convictions at trial, pled guilty to additional counts in the superseding indictment. Richard Gravatt was apprehended in the Los Angeles, California, area on or about December 10, 1999. As a result of his apprehension, the remaining Defendants, Richard Gravatt and Louis B. Oberhauser, were then tried before this Court and a jury during a six-week period of time in September and October, 2000. Defendant Richard Gravatt was convicted of 68 counts. Defendant Louis B. Oberhauser, as previously noted, was convicted of two counts.

Defendant Oberhauser was convicted of Count 53, a money laundering count concerning a $160,000 transfer into the Oberhauser & Neveaux IOLTA trust account in August 1996. On August 28, 1996, Richard King requested a transfer of $160,000 from a Group Resources, Inc., Sun Trust Bank Account in Cleveland, Tennessee, to the Oberhauser & Neveaux IOLTA, trust account. With respect to Count 59, also money laundering, on November 25, 1996, $160,000 transferred from the Oberhauser & Neveaux IOLTA trust account to a charitable organization known as ChildHelp.

For the benefit of his firm's client, G-3, Inc., Defendant Oberhauser set up the Oberhauser & Neveaux IOLTA trust account at Anchor Bank in Wayzata, Minnesota, on February 1, 1996. G-3 was an entity the directors of which included Defendants Murray Evans and Joe King. On February 5, 1996, Defendant Joe King requested that Defendant Oberhauser up a trust account at Norwest Bank in place of the Anchor Bank account. Pursuant to Defendant Joe King's request, Defendant Oberhauser and his partner John Neveaux then set up an Oberhauser & Neveaux IOLTA trust account at Norwest Bank in Wayzata, Minnesota, on February 8, 1996, for the receipt and distribution of funds for their client, G-3, and its successor, K-7, Inc.

Also on February 8, 1996, Defendant Oberhauser sent Defendant Joe King a retainer letter stating, "I am very pleased that you have retained this firm to consult with you regarding corporate matters relating to G-3, Inc., and the distribution of funds." In the retainer agreement, Defendant Oberhauser states: "On behalf of G-3, Inc., I will accept wire transfers of funds into a designated depository account on G-3, Inc-'s behalf, and I will disburse these funds by check or wire transfer per written direction of Joe W. King or other parties properly authorized by corporate action and consented to in writing by a majority vote of the shareholders."

On February 12, 1996, Defendant Oberhauser faxed Defendant Joe King a memo regarding "instructions for wiring funds in [the] trust account," which contained information concerning the IOLTA trust account at Norwest Bank, Wayzata, Minnesota, including the bank's phone number, the trust account number, wiring instructions, and Barry Kelner and Rita Stevens as contact persons at Norwest Bank. G-3's directors then signed a corporate resolution providing that "the corporation desires to authorize a deposit of certain funds or instruments or other intangible property for the benefit of the corporation in the trust account of the law firm of Oberhauser & Neveaux ..." That corporate resolution authorized Defendant Joe King to direct that funds be deposited into the Oberhauser & Neveaux IOLTA trust account.

The Oberhauser & Neveaux VOLTA trust account at Norwest Bank in Wayzata, Minnesota, was primarily used by K-7, Inc. for the receipt of investor funds, rendering Oberhauser & Neveaux as an escrow agent. All Defendants, including Defendant Oberhauser, asserted throughout the trial that the investor funds were to be used for what they described as a legitimate T-Bill or treasury bill, leasing program. The

government maintained, from the inception of the indictment, that there was no proof of any legitimate or actual T-Bill leasing Program. Based upon the evidence provided to the Court, it is the Court's view that there is no credible evidence to suggest that there was ever such a legitimate program or that any of the so-called documents supposedly verifying the program were authentic. Nonetheless, that was the purpose for which the IOLTA trust account was set up at Norwest Bank in Wayzata, Minnesota.

Between March 14, 1996 and October 28, 1996 investors deposited a total of $3,51 1,000 into the trust account at Norwest Bank, Wayzata, Minnesota. These investor funds were to be placed in the promised leasing program. Each investor had a contract directly governing the terms and conditions for the use of these funds from the account.

In addition to the $3,511,000 in K-7 investor funds, the trust account also received four additional wire transfers, totaling $270,000: (1) from Group Resources, Inc., on August 28, 1996, for $160,000 (Count 53); (2) from P. L. Yang on May 19, 1997, for $60,000; (3) from Fargo Trust on December 11, 1997, for $25,000 (Count 85); and (4) from Cleveland Trust on December 11, 1997, for 525,000 (Count 86).

On October 17, 1996, Defendant Oberhauser transferred $600,000 to Adam Gaslowitz for an alleged "lease fee." On October 25, 1996, there was a $411,000 transfer out to K-7, Inc. for an alleged "partial set up fee." On October 29, 1996, there was a $2,400,000 transfer out to Tirzah Business Trust, which allegedly represented a John Dow Brokerage Commission. There was also a transfer on October 29, 1996, to K-7, Inc., for an alleged partial set up fee of $400,000. The above four transfers from the trust account totaled $3,511,000. K-7 had negotiated with an organization by the name of I.H.B.

On May 19,1997, P. L. Yang wire transferred $60,000 to the Oberhauser & Neveaux IOLTA trust account. The $60,000 was to be used at the direction of K-7 for so-called new replacement treasury bill documents, pursuant to an agreement that Defendant Oberhauser and K-7 had negotiated with an organization by the name of I.H.B. Even though it is the Court's conclusion that I.H.B. was not a legitimate organization, the fact is that K-7 then paid I.H.B. $60,000 that purportedly was going to help provide new replacement treasury bill documents. Defendant Oberhauser received directions from Defendant Joe King to wire the funds to I.H.B. as follows: "Please apply the $60,000 which was wired to your IOLTA trust account by Pei Lu Yang for the down payment of the lease of U.S. treasuries offered by Lynchburg and the contract to be signed by I.H.B. You have my authorization to wire such funds as requested by I.H.B," Defendant Oberhauser then sent a letter, dated May 28,1997, to Norwest Bank, directing the transfer of $60,000 from Oberhauser & Neveaux Norwest trust account to I.H.B. The records before the Court do establish that $60,000 was transferred in on May 19, 1997, and $60,000 was transferred out on May 29, 1997. However, there is no evidence in the record to suggest that Defendant Oberhauser had any basis to conclude that I.H.B. was anything other than a legitimate organization. Notably, none of the Defendants, to this day, would apparently share the Court's conclusion that I.H.B. was never established as a bona fide ongoing business entity as opposed to some type of shell corporation, with no assets whatsoever.

On December 9, 1997, Defendant Oberhauser requested that Defendant Joe King transfer $50,000 to his trust account so that he could complete a settlement that related to additional claims of I.H.B. for the so-called replacement treasury bills. Again, the Court notes "so-called" because the Court does not believe the evidence establishes the authenticity of any of these documents or the legitimacy of any of the

transactions. Nonetheless, Defendant Oberhauser received into the trust account $25,000 from Fargo Trust and $25,000 from Cleveland Trust on December 11, 1997. On December 12, 1997, $50,000 was transferred from the Oberhauser & Neveaux trust account to LH.B., and Defendant Oberhauser sent a letter with the wire transfer request which verified that it settled all claims between I.H.B. and K-7. Again, by referencing I.H.B., the Court does not suggest that the evidence established any such entity or replacement treasury bill transaction ever existed or occurred.

As noted previously, Defendant Oberhauser was convicted of Counts 53 and 59. With respect to Count 53, the trust account in question received a $160,000 wire transfer Group Resources, Inc., on August 28, 1996. The wire transfer authorization lists the "requestor" as Richard King. The account name is identified as "Group Resources, Inc." The transfer is directed to Barry Kelner/Rita Stevens, Norwest Bank Account #3972985792 (the Oberhauser & Neveaux trust account). At trial, the parties disputed the purpose of the transfer. Defense expert Paul Walsh testified that, based upon his review of the documents, the transfer was "for charity." The government's position was that the evidence did not establish the precise purpose for the transfer, including whether there vas any basis to conclude that the transfer was "for charity." Relatedly, the evidence established that on August 29, 1996, Group Resources, Inc., wire transferred $80,327.91 directly from their Sun Trust Account to a ChildHelp bank account, without utilizing the Oberhauser & Neveaux trust account.

There was evidence at the time of trial showing that Oberhauser & Neveaux had a K-7 file labeled "Charitable Activities." In the file, the contact person for ChildHelp was identified as Wayne Swindler. The "Charitable Activities" file included a fax from Defendant Oberhauser to Swindler on

November 6, 1996, asking Mr. Swindler to: "Please review a letter of instruction, check numbers for correctness, and fax a signed copy back to my office. Thank you." Swindler approved the contents of the letter of instruction and faxed it back with the notation: "Okay. Wayne Swindler, CFO, ChildHelp." Defendant Oberhauser then signed the letter of instruction and, on November 25, 1996, Oberhauser & Neveaux authorized a wire transfer of $160,000 to ChildHelp at the western Bank, Encino, California. That transfer represented Count 59.

The parties, then and now, continue to dispute what the evidence and account shows with respect to the disposition of the $160,000 that was wired into the account on August 28, 1996 (Count 53), and the $160,000 that was wired out on November 25, 1996 (Count 59). The government maintained at trial that the August 28, 1996, wire transfer of $160,000 was used to make the 5600,000 payment to Adam Gaslowitz on October 17, 1996. The Defendant, then and now, maintains that the $160,000 from Group Resources, Inc., was always for charity, specifically ChildHelp, and was not used for funding the treasury bill program. The Defendant argued, then and now, that a total of $1,011,000 of investors' funds was received into the IOLTA trust account between March 14, 1996 and June 7,1996, and that the $160,000 wire transfer from Group Resources, Inc., on August 27, 1996, was not part of the $1,011,000. On October 17, 1996, Defendant Oberhauser transferred $600,000 to Adam Graslowitz for a purported initial "lease fee." The evidence establishes that there were funds in the account to cover the $600,000 lease payment fee and that the payment did not necessarily originate from or involve the $160,000 which had been received from Group

Resources, Inc., on August 28, 1996, whether it was designated for Child Help or not.[1]

In addition to the $600,000 noted above that was paid out to Adam Gaslowitz on October 17, 1996, a so-called partial set-up fee was paid to K-7, Inc. on October 25, 1996 in the amount of $411,000. On October 28, 1996, the IOLTA trust account received $2,600,000 from Gordon Groves. The following day, those funds were disbursed by a $2,400,000 transfer to the so-called Tirzah Business Trust (the purported John Dow Brokerage commission) and a $100,000 payment to K-7, Inc., as another purported partial set up fee. As it turn out, the investors' deposits of $1,011,000 matched the two disbursements in October 1996, prior to the $2,500,000 being received from Gordon Groves.

On November 25, 1996, Defendant Oberhauser transferred $160,000 (Count 59) to ChildHelp, pursuant to instructions and banking information the Defendant had previously received from ChildHelp, leaving the trust account with a nominal balance.

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[1] The Defendant also has a motion for a new trial before the Court which presents as "new evidence" documents that were in the possession of the government and to which the Defendant had access but did not discover until after the trial. In his motion for a new trial, Defendant maintains that the documents clearly establish that the $160,000 was designated prior to its receipt as movies to fund a specific project of ChildHelp USA, namely the construction of a gymnasium in Belmont, California. These documents have not been considered by the Court, however, in reaching its decision on the Defendant's motion for judgment of acquittal.

Both parties make much of the fact that the source of the funds for the $160,000 transfer to ChildHelp on November 25, 1996, is legally significant to the case. The government cites their exhibit that attempts to trace the funds (Government's Exhibit 379) while the Defendant cites his corresponding exhibit (Defendant's Exhibit 13). The government continues to assert that the October 28, 1996, transfer of $2.5 million from Gordon Groves (transferred by Sandro Sordi) funded the November 25,1996, $160,000 ChildHelp contribution. The Defendant, in turn, continues to allege that that is entirely erroneous and that, rather, the $160,000 was designated for ChildHelp in August 1996, when it was received from Group Resources, Inc., and was therefore not impacted by the $600,000 purported lease payment made to Adam Gaslowitz on October 17, 1996. while the Court concludes, separate from any exhibits it has been provided as part of the Defendant's new trial motion, that the direct and circumstantial evidence makes it more likely than not that the Defendant's accounting theory is more probably correct, it is the Court's view that the decision of this Court is the same, irrespective of which party accurately described the evidence as to the source of the lands for the $160,000 payout to ChildHelp in November 1996. Regardless of the source of the funds with respect to Counts 53 and 59, and regardless of whether the $160,000 that was deposited in August is the same $160,000 that went out in November for ChildHelp, there is insufficient evidence for this Court to conclude and for a reasonable jury to have concluded, that when the transfers were made on August 28, 1996, and November 25, 1996 (Counts 53 and.59), the Defendant knew that the money represented the proceeds of some form of unlawful activity. Further, there is insufficient evidence for this Court to conclude, even when the evidence is viewed in the light most favorable to the government, that the Defendant had the intent to promote the carrying on of the specified unlawful activity- that is, wire fraud and mail fraud.

There was no evidence presented that Defendant Oberhauser had knowledge concerning Group Resources, Inc., account or the source for deposits in the Group Resources, Inc., Sun Trust Bank account at the time he received the August 28, 1996, wire transfer of $160,000 (Count 53). Specifically, there was no evidence presented by the government that in August of 1996 Defendant Oberhauser had knowledge that K-7 was involved in a so-called T-Bill trading beyond the K-7 investors who deposited funds-in the Oberhauser & Neveaux IOLTA account. The evidence clearly does establish that the Group Resources, Inc., wire transfer $60,000 in August 1996 was composed of other investors' funds. However, there is no evidence to suggest that at that time, in August 1996, Defendant Oberhauser had any awareness, circumstantially or otherwise, that the Group Resources, Inc., transfer was composed of investors' funds from another so-called leasing program. What the evidence does establish is that Defendant Oberhauser acquired such knowledge sometime in April 1997, if not before, however, not as early as fall 1996.

Unfortunately, perhaps for both parties, neither ChildHelp nor K-7's involvement in charities played a significant role in either the prosecution or the defense of the case. There was hardly any evidence presented with respect to either entity on this issue. There was no examination of any kind of Defendant Oberhauser with respect to the purpose or intent behind the transfers related to ChildHelp. (Counts 53 and 59.) That is not to suggest that Defendants Joe King and Gravatt did not utilize the lure and the aura of legitimacy that charitable contributions could bring to their scheme. Without speculating on the motives of either Defendants Joe King or Gravatt, ChildHelp plaques were displayed on the walls of K-7 and, not infrequently, investors heard from Defendants Joe King and Gravatt impassioned pleas about the commitment of both men and their organization to the charitable cause of

ChildHelp. There is no question that the evidence confirms the testimony of the government's expert, Laura Shilling, that such representations, including representations that a percentage of profits would go to charity, gave "comfort" to investors and lulled them into a false sense of security.

The Defendant makes much of the argument that since no investor was aware of any plan to pay $160,000 to ChildHelp, then there was no evidence that anyone intended for this specific transaction to lure or lull the investors, thus promoting the scheme to defraud investors. The Court disagrees. If indeed the evidence established, which it did not, the Defendant 0berhauser knew that the charity representations with respect to ChildHelp were part of the overall fraud or scam, the government still had to prove that at the time the Defendant conducted the financial transactions- in this case, Counts 53 and 59 he knew the money represented the proceeds of some form of unlawful activity and that the financial transactions were conducted -with the intent to promote the carrying on of the specified unlawful activity- that being, Wire fraud and mail fraud. (*See* Jury Instructions, p. 29.) *United States v. Hildebrand*,152 F.3 d 756, 762 (8th Cir. 1998); *United States v. Jolivet*, 224 .1.3d 902, 909 (8th Cir. 2000). For the reasons discussed below, the Court finds that there is insufficient evidence to establish that Defendant Oberhauser had any knowledge of illegality or intent to promote such illegality when conducting the two transactions involved in Counts 53 and 59.

Motion for Judgment of Acquittal

A. Standard of Review

When considering a challenge to the suffciency of the evidence to support a guilty verdict, the Court must view the evidence in the light most favorable to the verdict and accept as established all reasonable inferences supporting the verdict. *See United States v. Maggard*, 156 F.3d 843, 846 (8th

Cir.1998), *cert. denied sub nom. Vaggard v. United States*, 119 S. Ct.1094(1999), *and cert. denied*, 119 S. Ct. 1372 (1999).

In *United States v. Chavez*, 230 F.3 d 1089,1091 (8th Cir. 2000), the Eighth Circuit articulated unequivocally the standard for a trial court's consideration of a motion for judgment of acquittal:

> In ruling on a motion for acquittal, the role of the district court is not to weigh evidence or consider the credibility of the witnesses, but rather to determine whether the Government has presented evidence on each element sufficient to support a jury verdict. *See Burks v. United States*, 437 U.S.1(1978); *United States v. Bredell*, 884 F.2d 1081, 1082 (8th Cir.1989). Questions of credibility are the province of the jury. *See United States v. Fuller*, 942 F.2d 454, 458 (8th Cir.1992).

The Court is not unmindful that any attack on the sufficiency of the evidence is to be viewed very strictly and, of course, "the verdict of the jury should not be overturned lightly." United States v. Burks, 934 F.2d 148,151 (8th Cir.1991).

B. The Elements of Money Laundering

Both parties agree that the crime of money laundering as charged in Counts 53 and 59 has four essential elements. As the Court instructed the jury at the end of trial, the elements are as follows: (1) On or about the dates identified in the indictment the defendants conducted financial transactions which affected interstate commerce; (2) the defendants conducted the financial transactions with money that involved the proceeds of the specified unlawful activity, that is wire fraud and mail fraud; (3) at the time the defendants conducted the financial transactions, the

defendants kmew the money represented the proceeds of some form of unlawful activity; and (4) the defendants conducted the financial transactions with the intent to promote the carrying on of the specified unlawful activity, that is wire fraud and mail fraud.

There is no evidence in the record to suggest that the Defendant knew that the money represented the proceeds of some form of unlawful activity when the $160,000 transfer from Group Resources, Inc., was made on August 28, 1996. Moreover, even when the evidence is viewed in the light most favorable to the verdicts and the Court accepts, as established, all reasonable inferences supporting the verdicts, the government simply did not prove that at the time of each financial transaction associated with Counts 53 and 59, that the Defendant knew thatthe money represented the proceeds of some form of unlawful activity. Admittedly, here is circumstantial evidence in the case to conclude otherwise, starting in April 1997. However, these transactions occurred in August 1996 and November 1996. Moreover, both transfers occurred so early in the fraudulent scheme that there is no basis by which the government can argue that Defendant Oberhauser turned a blind eye or otherwise deliberately avoided criminal knowledge. There is no doubt that Defendant Oberhauser's role changed after all funds were disbursed and various problems were encountered with the program. It was only then that investors started to press and question Defendants Joe King and Gravatt, and it was then that Defendants Joe King and Gravatt insisted that Defendant Oberhauser take on a different role. Consequently, the Defendant's level of knowledge was quite different, beginning in the early part of 1997, specifically in April 1997, than it was from August through November,1996.

Again, even when evaluating the evidence in the light most favorable to the verdict and accepting, as established, all

reasonable inferences supporting the verdict with respect to Counts 53 and 59, there is no evidence that either the $160,000 deposit into or the transfer out of Defendant Oberhauser's test account promoted the underlying criminal activity in any way. There is no evidence to suggest that either transfer was to be reinvested back into the underlying fraud scheme or that the transaction in any way actually promoted the underlying fraud scheme. No evidence was presented that any investor knew about the wire transfer in November 1996, that K-7 touted the transfer in any way to influence investors, or that it was otherwise manipulated or refereed to, whether directly or indirectly, in an attempt to promote the underlying scheme or to solicit prospective investors.

Certainly, the government does not have to trace the funds to prove a violation of § 1956. *United States v. Penningron,* 168 F.3d 1060 (8th Cir.1999). However, the government is required to show more than that a particular financial transaction promoted the underlying criminal activity. Even assuming, for purposes of the Court's evaluation, that the transfers in August and November 1996 unwittingly or otherwise promoted the underlying criminal activity, the government still must prove that the Defendant intended to promote the underlying criminal activity to sustain a conviction under the promotional prong of the law. *United States v. Nattier,* 21 F.3d 665 (8th Cir.1997). There is insufficient evidence that the two transfers in question were financial transactions conducted "with the intent to promote the carrying on of specified unlawful activity." The position of the government largely ignores the intent aspect of the promotion element Section 1956(a)(1)(A.)(i) is not satisfied by a showing that a financial transaction involving the proceeds of specified unlawful activity merely promoted the carrying on of unlawful activity. That provision has an intent element that must be satisfied so that evidence of intentional promotion

must be present. Otherwise, the money laundering statute for the Court could be transformed into a "money spending" statute any time money was expended or deposited. *United States v. Jolivet*, 244 F.3d 902 (8th Cir. 2000); *United States v. Nattier*, 127 F.3d 655 (8th Cir.1997). *See also* Money Laundering: Federal Prosecution Manual, Chapter 3 (U.S. Department of Justice, 1993); Eighth Circuit Manual of Model Jury Instructions: Criminal, § 6.18.1956A, Committee Comments and Notes on Use (2000).

With respect to the aiding and abetting portion of the indictment, Defendant Oberhauser's mere association with the Defendants, particularly Defendants Joe King and Gravatt is legally insufficient to sustain an aiding and abetting conviction, absent some type of affirmative or intentional participation in the transactions. There is insufficient evidence to support the conclusion that the $160,000 transfer into the IOLTA trust account in August 1996 and $160,000 transfer out in November 1996 to ChildHelp Promoted the specified unlawful activity or that the Defendant intentionally promoted the carrying on of the unlawful activity.

While the Court rejects the Defendant's characterization of these transactions as benign expenditures, the evidence before the Court is wholly insufficient to permit a jury to have drawn a reasonable inference of guilty knowledge and intent. The government is, of course, allowed to rely on circumstantial evidence, but that circumstantial evidence must go beyond speculation and conjecture.

Most of the evidence cited by the government occurred after the ChildHelp transactions in 1996. Even though this Court is not prohibited from considering that evidence simply because defendant was acquitted of all charges, there is no evidence in the record, subsequent to the transactions in August and November 1996, that would prove,

circumstantially or otherwise, that Defendant Oberhauser knew of any specified unlawful activity with respect to Counts 53 and 59 in August of 1996, in November of 1996, or that he acted with intent to promote the carrying on of that illegal activity. *United States v. Heron*, 97 F.3d 234 (8th Cir.1996); *United States v. Rockelman*, 49 F.3d 418 (8th Cir.1995).

With respect to Counts 53 and 59, given the nature of the transactions and when they occurred, based upon the evidence that the jury heard in this case and that this Court has carefully scrutinized, one can easily see how the jury, amongst 66 counts in a complaint and a joint trial, struggled with money transfers where there were no partial participation agreements and no clear cut language in the IOLTA agreement that would explain the transactions, particularly when the $160,000 ended up in the hands of a legitimate charity organization vis-a-vis Defendants Joe King and Gravatt. While this Court will not speculate about the verdicts reached in Counts 53 and 59, they might well be characterized as breach of contract counts (trust account), in light of the evidence, to the extent they represent transactions where investors did not directly pay into the Defendant's IOLTA account. However, the Court does not have to assume anything in order to conclude that the evidence is woefully insufficient with respect to the elements of promotional money laundering in Counts 53 and 59. Contrary to the position of the government, mere acceptance of funds into the IOLTA trust account is insufficient for conviction of promotional money laundering. Even if the Court were to accept the government's argument that there was some type of implied, if not explicit, restriction on the IOLTA account that would restrict Defendant Oberhauser's receipt of funds from Group Resources, Inc., for the benefit of ChildHelp, accepting a wire transfer does not demonstrate criminal intent and criminal knowledge when Defendant Oberhauser did not

control deposits going into the account. Thus, even if the Defendant violated the terms of the IOLTA trust agreement by "accepting" a wire transfer into the account, that is not tantamount to showing criminal intent. Whether the Defendant was a lawyer or not, his responsiblity was not to evaluate and determine the source of deposits into the account. Defendant Oberhauser received the transfers into the IOLTA trust account and disbursed them to third parties consistent with instructions from his client. With or without a breach-technical or otherwise-of the IOLTA trust agreement, the government failed to prove that Defendant Oberhauser intended to promote the underlying fraudulent scheme by facilitating a transfer of funds into the IOLTA trust account (Count 53) or facilitating a transfer of funds out of the IOLTA trust account to charity (Count 59).

And, contrary to the Defendant's position in the case, the Defendant's role as a lawyer played no part in the Court's evaluation of the evidence. In fact, the only difficulty the Court has with this decision is the fact that it may send the wrong message to a Defendant who happens to be an attorney who has denigrated the profession by his behavior. It is bothersome to the Court that Defendant Oberhauser insisted throughout the trial that: "I am not a securities lawyer, I am a corporate lawyer," yet he never passed that wisdom, which is really an admission of ignorance, on to any of the investors, even after the fact. Quite tragically for the legal profession and its reputation, while there was no evidence that the Defendant profited from any of these transactions except for his hourly legal fees, it appears that the Defendant's greed and/or access to easy hourly fees motivated his behavior. At least in April 1997, if not before, the Defendant should have disclosed that he was not a securities lawyer, but rather a corporate lawyer who knew nothing about any so-called T-Bill leasing program. It is that behavior that damages and disgraces the legal profession.

The Defendant's conduct in the Monarch transaction, which was not charged, and Defendant's general behavior of playing the victim in the case, is offensive to the Court and brings disrepute to the legal profession. The Monarch transaction involved a $1.9 million promissory note presented by Defendant to be signed by Scott Wallis and ultimately used to inflate the balance of the trust account to reach the threshold for distributions as established in the investors' partial participation agreements. While such conduct may well have violated the partial participation agreements and even assuming that to be the case, such violations resonate with breach of contract and/or fiduciary duties rather than criminal intent, and the Court's evaluation of the sufficiency of the evidence remains the same. The fact remains that there is insufficient evidence in the record to prove that Defendant Oberhauser conducted the two financial transactions in question, knowing that the money represented the proceeds of some form of unlawful activity, or that he conducted those transactions with the intent to promote the carrying on of the specified unlawful activity-that is, wire fraud and mail fraud.

Quite amazingly, from the Court's point of view, but consistent with the evidence in the case, a Co-Defendant in the case and primary witness for the government, whom the Court and the government found to be truthful-Scott Wallis-testified under oath that as late as early 1998, he did not believe that he was involved in a scam or fraudulent scheme. Yet, the government suggests that somehow Defendant Oberhauser knew of the unlawful activity and the scheme as early as August and November 1996. The Court disagrees for the reasons stated.

If the Court had concluded that there was sufficient evidence in the record to support the jury verdicts as to Counts 53 and 59, which it has not, it is worth noting that the Defendant's role and capacity as a Lawyer would not have

shield from criminal responsibility. The Court does not need to reach the issue as it relates to Counts 53 and 59 as to whether Defendant Oberhauser handled the IOLTA trust account and these two transfers consistent wish his ethical responsibilities. If the evidence was otherwise sufficient, his role as a lawyer would not provide a defense or a shield from responsibility. There are perhaps a variety of reasons, based upon the evidence, why Defendants Joe King and Gravatt involved a lawyer, in this case defendant Oberhauser, into the schemes established by the evidence. Whether the purpose was to provide them a shield, to establish a middle man, or to somehow lull investors into a prolonged false sense of security, does not nullify the government's responsibility to prove all elements of money laundering, including criminal intent.

The jury in this case was certainly dedicated and reasonable-minded. However, the Court, concludes, for the reasons stated, that the jury must have entertained reasonable doubt as to the government's proof of at least two of the essential elements in Counts 53 and 59, even when the evidence is viewed in the light most favorable to those verdicts and when the Court accepts all reasonable inferences supporting the verdicts. *United States v. Kinshaw*, 71 F.3d 268 (8th Cir. 1995) *United v. Munn*, 940 F.2d 1128 (8th Cir.1991).

For the reasons stated, Defendant Louis B. Oberhauser's motion for a judgment of acquittal is granted. It is a rare case indeed, when a judge should grant such a motion after a six-week trial. However, this is such a case.

a. Motion for a New Trial

Defendant Louis B. Oberhauser has moved the Court, pursuant to Fed. R. Crim. P. 33 for a new trial on four separate grounds: (1) error in giving a "willful blindness" instruction relating to counts 53 and 59; (2) prejudicial

joinder with Co-Defendant Gravatt; (3) the interests of justice; and (4) newly discovered evidence.

With respect to the Defendant's motion for a new trial based upon the Court's decision to "willful blindness" instruction and the Court's decision to join for trial Defendants Louis B. Oberhauser and Richard C. Gravatt, the Court stands by its prior rulings in this case and therefore denies Defendant's motion for a new trial on either or both grounds.

The Defendant has also moved the Court for a new trial in the interests of justice, alleging that the verdicts are against the weight of the evidence. Rule 33 of the Federal Rules of Criminal procedure provides that a trial court may order a new trial in the "interests of justice" in cases where the jury's verdict is against the weight of the evidence. Unlike a motion for a judgment of acquittal, in reviewing a motion for a new trial, pursuant to Rule 33, the Court is not required to view the evidence in the light most favorable to the government. *United States v. Brown*, 956 F.2d 782 (8th Cir.1992); *United States v. Davis*,103 F 3d 615 (8th Cir.1996) *United States v. Lincoln*,630 F.2d 1313 (8th Cir.1980)

Again, this authority should be exercised sparingly and with caution. *Lincoln*, 630 F.2d at 1319. With due and appropriate deference to the jury's verdict on Counts 53 and 59, and for the reasons stated in the Memorandum with respect to the Court's granting the Defendant's motion for a judgment of acquittal, the Court finds and concludes that those verdicts are contrary to the weight of the evidence. That is particularly the case when the newly discovered evidence, consisting of nine documents, is considered. All nine documents relate to the transactions addressed in Counts 53 and 59.

The nine newly discovered documents are as follows:

(1) August 27, 1996, letter from Joe King to Defendant Oberhuser;

(2) Facsimile transmittal cover sheet accompanying the August 27, 1996, letter;

(3) Facsimile transmittal cover sheet accompanying the August 27, 1996, Joe King letter faxed directly by K-7 to the ChildHelp Arizona office;

(4) Memo dated March 13, 1996, from Joe King to Richard King;

(5) Defendant Oberhauser's letter to ChildHelp at the Arizona address and Arizona facsimile number dated August 28, 1996;

(6) Facsimile transmittal cover sheet by Defendant Oberhauser to ChildHelp on August 29,1996;

(7) A ChildHelp internal document dated August 23,1996;

(8) A ChildHelp internal document confirming receipt of $160,000 wire transfer from Oberhauser & Neveaux dated November 25,1996; and

(9) A ChildHelp internal document dated March 18, 1996.

A motion for a new trial based on newly discovered evidence must satisfy the following five requirements: (1) the evidence must be, in fact, nearly discovered, that is discovered since the trial; (2) facts must be alleged from which the court may infer diligence on the part of the movant;

(3) the evidence relied upon must not be merely cumulative or impeaching; (4) it must be material to the issues involved; and (5) it must be of such a nature that, on a new trial, the newly discovered evidence would probably produce an acquittal. *United States v. Liebo*, 923 F.2d 1308, 313 (8th Cir.1991); *see also United States v. LaFuente* 991 F.2d 1406, 1408 (8th Cir. 1993) *United States v. Begnaud*, 848 F.2d 111, 113 (8th Cir.1988 . A motion for a new trial based on newly discovered evidence should be considered cautiously, and the trial court has broad discretion in deciding whether to grant or deny the motion. *See Liebo*, 923 F.2d at 1313.

First of all, the newly discovered evidence consists, as noted above, of nine documents. Those documents were in the government discovery and were accessible to defense counsel prior to and during the trial. The Court assumes that neither the defense nor the government reviewed these documents until after the jury's verdict. Some of these documents were part of the estimated 25,000 pages of documents copied by the defense from the government's discovery of approximately 350,000-400,000 pages of documents seized or subpoenaed. Other documents were not copied or reviewed until January 30, 2001, according to the affidavit of defense counsel, William J. Mauzy.

It is the Court's view that both parties proceeded in good faith. The fact that some of these documents may have been overlooked or misfiled, and therefore not reviewed, is understandable. The failure to discover the documents was not due to lack of diligence. Certainly, the new documents are material to the verdicts reached in the case with respect to counts 53 and 59. The new documents are not entirely cumulative, although they are not nearly as significant as asserted by the defense in its memorandum to the Court. Of more significance to the Court is the fact that given the Court's analysis of the insufficiency of the evidence, when the new

evidence is viewed in light of the entire record made at trial, the new evidence is sufficient to create a reasonable doubt. Thus, the Court concludes that the Defendant has satisfied all of the elements of the *Liebo* test because the new evidence, when viewed in the context of the entire record, would more likely than not have created sufficient reasonable doubt to produce acquittals on Counts 53 and 59.

Therefore, consistent with Rule 29(d) of the Federal Rules of Criminal Procedure and for the reasons set forth in the Memorandum of this Court, the Court conditionally grants the Rule 33 motion of Defendant Louis B. Oberhauser for a new trial in the event that the Court's decision granting the judgment of acquittal is vacated or reversed on appeal. Since the motion for a new trial has been granted conditionally, if the judgment of acquittal is reversed on appeal, the new trial shall proceed unless otherwise ordered by the appellate court. Subsequent proceedings shall be in accordance with the order of the appellate court, consistent with Rule 29(d).

D.W.F.

Supreme Court, U.S.
FILED
NOV 7
CLERK

No. 02-374

In the Supreme Court of the United States

LOUIS B. OBERHAUSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to support petitioner's conviction for money laundering under 18 U.S.C. 1956(a)(1)(A)(i).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970)	10
United States v. *Beckner*, 134 F.3d 714 (5th Cir. 1998)	10
United States v. *Brown*, 186 F.3d 661 (5th Cir. 1999)	8
United States v. *Calderon*, 169 F.3d 718 (11th Cir. 1999)	8
United States v. *Dimeck*, 24 F.3d 1239 (10th Cir. 1994)	8
United States v. *Haun*, 90 F.3d 1096 (6th Cir. 1996), cert. denied, 519 U.S. 1059 (1997)	7
United States v. *Heaps*, 39 F.3d 479 (4th Cir. 1994)	7
United States v. *Jackson*, 935 F.2d 832 (7th Cir. 1991)	8
United States v. *Jolivet*, 224 F.3d 902 (8th Cir. 2000)	5, 7, 8
United States v. *Lovasco*, 431 U.S. 783 (1977)	10
United States v. *Montoya*, 945 F.2d 1068 (9th Cir. 1991)	7
United States v. *Olaniyi-Oke*, 199 F.3d 767 (5th Cir. 1999)	8
United States v. *Paramo*, 998 F.2d 1212 (3d Cir. 1993), cert. denied, 510 U.S. 1121 (1994)	7

Cases—Continued: Page

United States v. *Sanders*, 928 F.2d 940 (10th Cir.), cert. denied, 502 U.S. 845 (1991) 8
United States v. *Valuck*, 286 F.3d 221 (5th Cir. 2002), cert. denied, No. 01-11006 (Nov. 4, 2002) 7, 8
Zobrest v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) 10

Statutes:

18 U.S.C. 1341 4
18 U.S.C. 1343 4
18 U.S.C. 1956(a)(1) 4, 7
18 U.S.C. 1956(a)(1)(A)(i) 2, 5, 6-7, 10
18 U.S.C. 1956(a)(1)(B)(i) 8
18 U.S.C. 1956(h) 4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A10) is reported at 284 F.3d 827. The opinion of the district court (Pet. App. A11-A35) is reported at 142 F. Supp. 2d 1118.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 2002. A petition for rehearing was denied on June 10, 2002 (Pet. App. A1). The petition for a writ of certiorari was filed on September 5, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Minnesota, petitioner was

convicted of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i). The district court granted petitioner's motion for a judgment of acquittal and conditionally granted petitioner's motion for a new trial. Pet. App. A11-A35. The court of appeals reversed the district court's judgment and reinstated the jury's guilty verdict. *Id.* at A2-A10.

1. Petitioner and his co-defendants perpetrated a ponzi scheme in which investors lost more than $11 million. The scheme operated through a shell corporation called K-7, the principals of which were petitioner's co-defendants—Richard Gravatt, Joe King, Richard King, Murray Evans, Frank Taylor, and Scott Wallis. Petitioner was K-7's lawyer and the escrow agent for some of the investors' funds. Pet. App. A2.

Potential investors in K-7 were told that the corporation planned to conduct a $5.5 million United States Treasury bill "leasing" program that would yield investors a risk-free, 2000 percent return. Pet. App. A4; see Gov't C.A. Br. 1. More specifically, investors were told that organizations holding large numbers of Treasury bills were willing to lease the securities at a modest interest rate. *Id.* at 4. The leased Treasury bills would be used as collateral to obtain a bank loan which, in turn, would be used to fund a "high-yield Trading program." *Ibid.* To protect the investors in case the Treasury bills were "liened or encumbered or confiscated," a K-7 principal was purported to have a $10 billion account with a New York brokerage house—the existence of which could only be verified in person in New York—which would be used to reimburse the owners of the Treasury bills. *Ibid.* To make the program attractive to employees and potential investors, K-7 planned to make contributions from its profits to the charity ChildHelp. *Id.* at 6; Pet. App. A4.

K-7 had two investment-generating mechanisms. Pet. App. A5. Under the first, investors contracted with K-7, and their funds were deposited into an account in the name of Group Resources, Inc., at the SunTrust Bank. *Ibid.*; Gov't C.A. Br. 17. The investor contracts represented that K-7 had the "knowledge, experience and contacts in the marketplace for bank instruments necessary to make prudent decisions in the contracting for leasing of United States Treasury" bills. Pet. App. A5. Under the second mechanism, investors contracted with petitioner, who placed investors' funds in an attorney trust account set up for the exclusive purpose of holding investors' money. The contracts specified that, when the account balance reached $5.5 million, petitioner was authorized "to act upon [the investor's] behalf for the purpose of entering into a trading program." *Ibid.*

On August 28, 1996, anticipating that the Group Resources account would be closed because of SunTrust's suspicions of money laundering, Joe King transferred $160,000 from that account to petitioner's attorney trust account. Gov't C.A. Br. 18; Pet. App. A5-A6. Petitioner was familiar with the Group Resources account because K-7 had previously used the account to pay him for legal services. Although petitioner did not have a contract with the investors whose funds were held in the Group Resources account, petitioner nonetheless accepted the $160,000 into his attorney trust account and identified the money as investor funds. *Id.* at A6.

Between October and November 1996—before the account balance reached $5.5 million—petitioner transferred the bulk of the investors' funds out of his attorney trust account. Pet. App. A6-A7. For example, he transferred several hundred thousand dollars to K-7,

and $2.4 million as a "broker's commission." *Id.* at A6. On November 25, 1996, petitioner transferred $160,000 to ChildHelp. *Id.* at A7.

Thereafter, petitioner repeatedly sought to lull nervous investors into staying with the K-7 program, and he actively dissuaded them from contacting law enforcement authorities. Gov't C.A. Br. 23-25, 27, 29-30. Investors eventually contacted the FBI, however, and began recording their conversations with petitioner. In the recordings, petitioner provided excuses for why the scheme had failed to pay out as promised and discouraged investors from reporting the scheme to law enforcement officials. *Id.* at 29-30.

2. a. On January 6, 2000, a federal grand jury in the District of Minnesota returned a second superseding indictment that charged petitioner with conspiracy to commit wire fraud, in violation of 18 U.S.C. 1956(h); wire fraud, in violation of 18 U.S.C. 1343; mail fraud, in violation of 18 U.S.C. 1341; money laundering, in violation of 18 U.S.C. 1956(a)(1); and conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h). One of the money laundering counts was based on petitioner's receipt into his attorney trust fund account of the $160,000 wired from the Group Resources account. Second Superceding Indictment 26. Another money laundering count was based on petitioner's subsequent wire transfer of $160,000 from the attorney trust fund account to the charity ChildHelp. *Id.* at 27.

b. A petit jury found petitioner guilty of those two counts of money laundering but found him not guilty of the remaining charges. Pet. App. A12-A13. The district court set aside the jury's verdict and directed a judgment of acquittal on the two money laundering counts. *Id.* at A11-A35. The district court also granted

petitioner's motion for a new trial "in the event that the Court's decision granting the judgment of acquittal is vacated or reversed on appeal." *Id.* at A35.

In granting the motions, the district court found that "the government simply did not prove that at the time of each financial transaction associated with [the money laundering counts], [petitioner] knew that the money represented the proceeds of some form of unlawful activity." Pet. App. A25. Although the district court found that there was "no credible evidence to suggest that there was ever * * * a legitimate program or that any of the so-called documents supposedly verifying the program were authentic," *id.* at A16, and that the evidence demonstrated that petitioner knew that the scheme was unlawful at later times, the court concluded that "both transfers occurred so early in the fraudulent scheme that there is no basis by which the government can argue that [petitioner] turned a blind eye or otherwise deliberately avoided criminal knowledge." *Id.* at A25. In addition, the district court relied on the court of appeals' decision in *United States* v. *Jolivet*, 224 F.3d 902 (8th Cir. 2000), to conclude that the mere transfer of criminally obtained funds into or out of an attorney trust account could not constitute money laundering with the intent to promote unlawful activity, in violation of 18 U.S.C. 1956(a)(1)(A)(i). Pet. App. A26-A27; see *id.* at A8.

3. The court of appeals reversed. Pet. App. A2-A10. The court observed that the K-7 scheme had promised "highly improbable" returns, petitioner drafted the legal documents involved in the scheme, petitioner did not himself invest in the scheme, petitioner contracted directly with investors and then violated his duties to them by transferring money out of the attorney trust account before it reached the $5.5 million threshold, and

petitioner had a financial motive to promote the fraudulent scheme. *Id.* at A8-A9. Accordingly, the court of appeals concluded that "a reasonable jury could find [that petitioner] knew K-7's program was not legitimate * * * by [the time of the two $160,000 transfers], and instead of withdrawing, continued as a willing participant in the scheme in return for substantial compensation." *Id.* at A8. The court of appeals also found that, "[b]ecause K-7 induced investors to give them money by stating their profits went to charity and by prominently displaying plaques commemorating their contributions, the transfer to the charity promoted continuation of the fraud scheme." *Id.* at A9.

For those reasons, the court of appeals rejected the district court's reliance on the court of appeals' decision in *Jolivet*. Pet. App. A7-A9. The court of appeals instead agreed with the government that petitioner's knowledge that the funds that he transferred were the proceeds of unlawful activity and his intent to promote the carrying on of unlawful activity were proved, not merely by his acceptance of funds into the attorney trust account, but "by direct proof of [his] understanding of the fraudulent nature of K-7's Treasury bill leasing program or his willful blindness to such facts." *Ibid.*[1]

ARGUMENT

Petitioner contends (Pet. 9-13) that this Court should grant certiorari to resolve a conflict among the courts of appeals on the question whether the intent to promote the carrying on of unlawful activity under 18 U.S.C.

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[1] The court of appeals also concluded that the district court had abused its discretion in granting petitioner's motion for a new trial. Pet. App. A10. Petitioner does not raise that issue before this Court.

1956(a)(1)(A)(i) can be established by the defendant's "mere deposit" (Pet. 11) of the proceeds of unlawful activity. That question, however, is not presented here.[2]

There is some disagreement among the circuits on the question whether a defendant's receipt, deposit, or cashing of proceeds is sufficient to establish an intent to promote unlawful activity under Section 1956(a)(1)(A)(i). The Third, Fifth, and Ninth Circuits have held that the receipt, deposit, or cashing of proceeds is sufficient to establish the requisite intent when that activity is necessary for the defendant to realize the benefit of the underlying unlawful activity. See *United States* v. *Paramo*, 998 F.2d 1212, 1218 (3d Cir. 1993), cert. denied, 510 U.S. 1121 (1994); *United States* v. *Valuck*, 286 F.3d 221, 227-228 (5th Cir. 2002), cert. denied, No. 01-11006 (Nov. 4, 2002); *United States* v. *Montoya*, 945 F.2d 1068, 1076 (9th Cir. 1991); see also *United States* v. *Haun*, 90 F.3d 1096, 1100-1101 (6th Cir. 1996) (upholding promotion conviction because the deposit of checks derived from the fraud scheme promoted both "prior unlawful activity" and future unlawful acts), cert. denied, 519 U.S. 1059 (1997).

The Fourth and Eighth Circuits have held to the contrary. *United States* v. *Heaps*, 39 F.3d 479, 485-486 (4th Cir. 1994); *United States* v. *Jolivet*, 224 F.3d 902, 909-911 (8th Cir. 2000). In *Heaps*, the Fourth Circuit reasoned that money laundering must be distinct from the

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[2] The government has petitioned for certiorari in *United States* v. *Scialabba*, No. 02-442, on the question whether "proceeds" in 18 U.S.C. 1956(a)(1) means the gross receipts from unlawful activities or only the profits. Because petitioner does not dispute that the transactions underlying his money laundering convictions involved the proceeds of unlawful activity, there is no reason to hold the petition in this case pending the Court's disposition of the government's petition in *Scialabba*.

underlying offense, and that the receipt and cashing of proceeds of a drug transaction is not sufficiently distinct from the drug transaction itself. 39 F.3d at 485-486. In *Jolivet*, the Eighth Circuit reasoned that a defendant may not promote the carrying on of an already completed crime. 224 F.3d at 909. See also *United States* v. *Calderon*, 169 F.3d 718, 721-722 (11th Cir. 1999) (finding it unnecessary to decide whether *Montoya*, *Paramo*, and *Haun* were correctly decided, but reversing promotional money laundering conviction based on the delivery of cash to an undercover agent because there was no evidence that the delivery furthered the underlying unlawful activity).[3]

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[3] The other cases on which petitioner relies (Pet. 12-13) do not address the receipt or deposit issue. *United States* v. *Sanders*, 928 F.2d 940 (10th Cir.), cert. denied, 502 U.S. 845 (1991), and *United States* v. *Dimeck*, 24 F.3d 1239 (10th Cir. 1994), interpret 18 U.S.C. 1956(a)(1)(B)(i), a section of the money laundering statute that is not at issue in this case and that addresses transactions designed to conceal the criminal nature of proceeds rather than to promote unlawful activity. *United States* v. *Brown*, 186 F.3d 661 (5th Cir. 1999), and *United States* v. *Olaniyi-Oke*, 199 F.3d 767 (5th Cir. 1999), hold that mere spending of money, without more, does not constitute promotional money laundering. See *Valuck*, 286 F.3d at 225-227 (discussing and distinguishing those cases). *United States* v. *Jackson*, 935 F.2d 832, 841-842 (7th Cir. 1991), is also a spending case. The court there held that spending the proceeds of unlawful activity establishes an intent to promote unlawful activity when the proceeds are "plow[ed] back" into the activity, but spending on unrelated items does not establish the requisite intent to promote. *Id.* at 842. To the extent that petitioner's convictions are based on his expenditure of funds in the attorney trust account on ChildHelp, that expenditure promoted an ongoing underlying fraud by conveying the impression that the purported Treasury bill leasing program was profitable and that the profits were being donated to charity as investors had been promised. Those expenditures are thus quite different from the expenditures in

This case does not present the question on which the courts of appeals are divided because the Eighth Circuit did not hold that petitioner's intent to promote unlawful activity was established merely by his receipt or deposit of the proceeds of the fraud scheme. As noted above, that court previously held, in *Jolivet*, that a defendant's mere deposit of proceeds is *not* sufficient to establish his intent to promote unlawful activity. The court here concluded that petitioner's case is not governed by *Jolivet* because the government presented significant additional evidence of his criminal knowledge and intent to promote an ongoing scheme. See Pet. App. A8-A9.

As the court of appeals explained, petitioner's criminal knowledge and intent were established by "direct proof of [his] understanding of the fraudulent nature of K-7's Treasury bill leasing program" and evidence from which the jury could reasonably have concluded that he was "a willing participant in the scheme in return for substantial compensation." Pet. App. A8. The transfers of $160,000 in investor funds first into petitioner's attorney trust account and then from that account to ChildHelp "promoted continuation of the fraud scheme." *Id.* at A9. Investors were induced to participate in the scheme by promises that profits would be donated to charity, and the transfers enabled the defendants to maintain the impression that the scheme was profitable and that the promised charitable contributions would be made. *Id.* at A7, A9. Because the evidence shows that petitioner intended to do more than receive and deposit the proceeds of unlawful activity, and in fact sought to promote its success,

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Brown, *Olaniyi-Oke*, and *Jackson*, which were unrelated to the underlying criminal activity.

petitioner would not be entitled to relief under the law of any circuit.

Nor does petitioner present any other reason for this Court to grant review. Petitioner urges (Pet. 9-10) that his role as the lawyer for the K-7 scheme should exempt him from the reach of Section 1956(a)(1)(A)(i). Relying on *United States* v. *Beckner*, 134 F.3d 714, 719 (5th Cir. 1998), he argues that the statute should not apply to "the defendant who does no more than discharge properly his duties as an attorney." Pet. 10 (internal quotation marks omitted). But in *Beckner*—which did not involve money laundering—the court of appeals overturned an attorney's conviction for aiding and abetting his client's wire fraud because the government failed to prove that the attorney either was aware of his client's fraud or possessed information "that would lead a reasonable person to believe that fraud was occurring." *Beckner*, 134 F.3d at 719. Here, in contrast, the government presented ample evidence from which a reasonable jury could infer that petitioner either knew that the K-7 scheme was a fraud or was willfully blind to that fact. See Pet. App. A8-A9.

Petitioner also asserts that the district court's jury instructions did not define the phrase "to promote" in Section 1956(a)(1)(A)(i) and thus "[t]he jury was confused as to what intentionality meant." Pet. 11. Petitioner did not, however, raise that claim in the court of appeals, and the court of appeals did not address it. There is thus no reason for this Court to depart from its practice of not considering in the first instance claims that were not pressed or passed on below. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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